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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

VERONICA WILSON, et al.,

Plaintiffs and Appellants,

v.

CITY OF HAWTHORNE, et al.,

Defendants and Respondents.

B159307

(Los Angeles County
Super. Ct. No. 99C01832)

APPEAL from a judgment of the Superior Court for the County of Los Angeles.
James E. Satt, Judge. Affirmed.

Ken Mifflin and William J. Cleary, Jr., for Plaintiffs and Appellants.

Moore & Rutter and Mark D. Rutter for Defendants and Respondents.

SUMMARY

Appellant Veronica Wilson contends the trial court erred in granting summary judgment to the City of Hawthorne on her tort claims in connection with the execution of a search warrant obtained by the City's police department. Her position is that the State of California's Bureau of Narcotics Enforcement, whose employees were responsible for the alleged injuries, was an independent contractor whose liability is imputed to the City, and that the City failed to prove the contrary in its moving papers. Wilson's contention is without merit, because her complaint did not assert any theory of liability based on the City's responsibility for the Bureau's actions; the City was therefore not required to meet that issue to be entitled to summary judgment. Consequently, the trial court properly granted the City's motion when Wilson failed to provide a separate statement responding to the facts the City contended were undisputed, or otherwise to controvert the City's evidence.

FACTUAL AND PROCEDURAL BACKGROUND

Veronica Wilson and her two minor children sued the City of Hawthorne and two of its police officers, Larry Grajeda and Richard Monteverde, for personal injuries received during the execution of a search warrant for the apartment in which the Wilson family lived. Grajeda applied for the warrant, probable cause for which is not at issue on appeal. The warrant was executed at 6:00 a.m. on July 2, 1998 by four members of the State of California's Bureau of Narcotics Enforcement who, together with Detective Monteverde, conducted the search. No contraband was found and no property was seized as a result of the search.

Wilson alleged in her original complaint that the Hawthorne police forcibly removed her ten-year-old daughter from her bed and threw her to the floor, that her son was assaulted and placed in fear of bodily harm, and that she was forcibly handled without justification. Both Wilson and her daughter were handcuffed, although cuffs were removed when police were told her daughter's age. Subsequent deposition

testimony revealed Wilson suffered a quarter-inch cut on her thigh, and her daughter hit her left toe and her chest when she was snatched from her bed and thrown on the floor. Wilson's first amended complaint is not included in the record on appeal. However, the City's motion for summary judgment shows the amended complaint alleged causes of action for trespass to real property, battery, false arrest, abuse of process and intentional infliction of emotional distress.

The City, Grajeda and Monteverde each moved separately for summary judgment or, in the alternative, summary adjudication of issues. The City's evidence was that entry to the apartment was authorized by the warrant,¹ that knock-notice was given before forced entry was effected,² and that in any event the forced entry, handcuffing and alleged battery were not inflicted by employees of the City of Hawthorne. Grajeda was not present, and Monteverde did not enter the apartment until after the four Bureau of Narcotics Enforcement agents had secured the apartment, detained the Wilson family, and handcuffed Veronica Wilson and her daughter. Thus, the City contended there was no merit to Wilson's causes of action against the City or its officers for trespass, battery, abuse of process and intentional infliction of emotional distress; the cause of action for false arrest was without merit because the Wilsons were not arrested and their detention was privileged as incidental to the execution of a search warrant.

¹ The warrant authorized the search of several apartments at 12534 South Inglewood Avenue in Hawthorne; Grajeda's probable cause declaration described gang member use of guns in the apartment complex and purchases of drugs by a confidential reliable informant from several apartments, including the Wilson apartment.

² Monteverde's declaration asserted a Bureau of Narcotics Enforcement agent knocked and in a loud voice announced that police with a search warrant were demanding entry; after waiting approximately 15 seconds with no response, the Bureau's team forced entry into the apartment.

Wilson opposed the City's motion, but did not respond to the City's separate statement of undisputed facts.³ Instead, Wilson submitted her own "separate statement of disputed material facts." Wilson contended in substance that (1) the City of Hawthorne's police officers were acting with the assistance of the State Bureau of Narcotics Enforcement, thus rendering the Bureau an independent contractor for whose torts the City is liable,⁴ and (2) Wilson's testimony she did not hear any "knock-notice" warning contradicted Monteverde's testimony such notice was given.⁵ In reply, the City argued, *inter alia*, that (1) failure to comply with the separate statement requirement of Code of Civil Procedure section 437c, subdivision (b), constituted a sufficient ground for granting summary judgment; (2) Wilson's first amended complaint did not allege the City or its employees were responsible for the acts of Bureau of Narcotics Enforcement agents, nor did it allege any independent contractor relationship between the City and the Bureau; and (3) the Bureau of Narcotics Enforcement is neither an employee nor an independent contractor of the City.

³ According to the City's brief on appeal, Wilson did not respond to the separate motions for summary judgment or summary adjudication filed by Monteverde and Grajeda, and those motions do not appear in the record on appeal. Accordingly, only the trial court's grant of the City's motion for summary judgment is at issue on this appeal.

⁴ Wilson lodged a copy of Detective Monteverde's supplemental report on the execution of the search warrant, which states in part that "[o]n July 2, 1998 @ 0600 hours, with the assistance of State of California Department of Justice, Bureau of Narcotic[s] Enforcement investigators search warrants were executed at 12534 S. Inglewood Ave."

⁵ Specifically, Wilson contended factual disputes existed (1) as to whether there was compliance with the notice requirements of the Penal Code (on the trespass claim), (2) as to whether the Bureau of Narcotics Enforcement employees were acting independent of the City (on the battery claim), and (3) as to both points on the claims of abuse of process and intentional infliction of emotional distress. Wilson also contended the false arrest claim was valid because the Wilsons were detained for a time in excess of that required.

The trial court found the City, Monteverde and Grajeda were entitled to summary judgment. The court's order states:

“Specifically, the reasons include the failure of plaintiffs to comply with the separate statement requirements of California Rules of Court, Rule 342, the scope of the issues as framed by the first amended complaint and the undisputed facts and supporting evidence set forth in the separate statement of undisputed material facts supporting the motions of Larry Grajeda, Richard Monteverde and the City of Hawthorne for summary judgment.”

Judgment was entered on April 16, 2002, and this timely appeal followed.

DISCUSSION

Wilson argues she was not required to respond to the City's separate statement of undisputed facts because, in its motion, the City failed to establish a complete defense to the lawsuit. Specifically, the City failed “to prove that the Bureau agents, who did the personal and property damage, were neither agents nor independent contractors of the City.” If they were, Wilson contends, then liability would be imputed to the City under Government Code section 815.4, which makes a public entity liable for the tortious acts or omissions of an independent contractor of the public entity to the same extent a private person would be liable.⁶ Wilson's contention is untenable, because her complaint did not assert any theory of liability based on the Bureau's status as an independent contractor of the City.

Nothing in the record suggests Wilson alleged the City was vicariously or otherwise liable for the Bureau's acts. The original complaint did not make such an

⁶ Wilson also points out that the general rule that a principal is not liable for the torts of an independent contractor is subject to so many exceptions that little of the general rule now operates. (See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1009, p. 401 [general rule of nonliability is followed only where no good reason is found for departing from it, and considerations of policy frequently call for such departure].) Wilson does not, however, identify which of the exceptions to nonliability would apply here.

allegation. Wilson failed to include the operative first amended complaint in the record on appeal. Even overlooking that failure, it is evident from the trial court's comments at the summary judgment hearing that there were no such allegations in the amended complaint: "[T]here is nothing in the complaint that alleges that they [the Bureau of Narcotics Enforcement agents] were agents of [the City] or independent contractors."⁷

Unpleaded allegations need not be addressed on a motion for summary judgment. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98 fn. 4 ["[a] defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers"].)⁸ Under these circumstances, the City was not required to establish in its motion for summary judgment that the Bureau was not an agent or independent contractor of the City of Hawthorne.

⁷ The trial court also observed that Wilson had sought to file a second amended complaint, "which I denied because there was no showing of diligence in investigating or filing a claim against the State of California and its employees. And no claim was filed with the State of California, which is a condition precedent to a filing of the lawsuit. So I denied that motion. ¶ And the first amended complaint really doesn't have anything in there about the Bureau of Narcotics people, their agency, or whatever. . . . So there's really nothing in the pleadings even that suggests that. ¶ And I think you're bound by your pleadings. You can't just now raise those issues and say that the City of Hawthorne is liable for their acts."

⁸ Accord *Scolinos v. Kolts* (1995) 37 Cal.App.4th 635, 640-641 [summary judgment for defendants affirmed in suit to recover referral fee, because oral referral agreement made without client consent was unenforceable; plaintiff failed to allege defendants had promised to disclose the referral fee and obtain written consent, so defendants were not required to meet that issue to be entitled to summary judgment on breach of contract claim; "[o]n a motion for summary judgment, the issues are framed by the pleadings since it is those allegations to which the motion must respond"]; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 [function of pleadings in a motion for summary judgment is to delimit the scope of the issues; the pleadings are "the outer measure of materiality in a summary judgment proceeding"]; see 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 214, p. 625 ["[u]npleaded allegations need not be controverted"].

Thus, even if a policing authority of the State could be considered an independent contractor of a local police department by virtue of executing a search warrant issued to the local police—a proposition for which Wilson offers no legal authority—the City was entitled to summary judgment. Wilson did not assert this theory of liability in her complaint. Additionally, she did not respond as required to the material facts the City contended were undisputed. The latter failure alone may constitute “a sufficient ground, in the court’s discretion, for granting the motion.” (Code Civ. Proc., § 437c, subd. (b).) Finally, Wilson did not controvert the City’s evidence that entry was authorized by a proper search warrant and that the forced entry and alleged battery were not the actions of any employee of the City of Hawthorne. Thus, the City showed Wilson could not establish her claims for trespass to real property, battery, abuse of process and intentional infliction of emotional distress. Wilson did not contradict the City’s evidence the plaintiffs were not arrested and their detention was privileged as incidental to the execution of a valid search warrant. Accordingly, the trial court properly granted summary judgment to the City, Grajeda and Monteverde.

DISPOSITION

The judgment is affirmed. The City of Hawthorne is to recover its costs on appeal.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.